STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v
RYAN LAWSHAWN CHATMAN **No.**
Defendant-Appellee.

L.C. No. 15-000181-01-FC
COA No. 328246

APPLICATION FOR LEAVE TO APPEAL

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Statement of Judgment Appealed

The People seek leave from the judgment of the Court of Appeals reversing defendant's conviction, issued December 6, 2016.

Statement of the Question

I.

A judge may question witnesses, but may not in so doing create the appearance of advocacy or partiality against a party so that it is reasonably likely that the jury was improperly influenced by this appearance. Though this Court has held that where error of this sort occurs there is no review for harmless error where the issue is preserved, here the issue was *not* preserved, and so is review thus for plain error, with defendant failing to demonstrate that error, let alone plain error, occurred?

Defendant answers: NO

The People answer: YES

Statement of Facts

The Court of Appeals majority opinion accurately summarizes the facts.

This case arises from a shooting that occurred around 12:30 p.m. on November 21, 2014, at the home of Karla Mitchell at 12949 Penrod in Detroit. There were several undisputed facts elicited at trial. There was no dispute that the victim Kevin Lawless arrived at Mitchell's house around 8:00 a.m. to drink and play video games with defendant, Mitchell, and several other individuals—Michael "Mike" Grayson, Amanda Grayson, and Sharvell Elliot—who were also visiting Mitchell that day. It was also undisputed that some hours later, while in Mitchell's kitchen, Lawless and defendant began to argue. Further undisputed was that defendant had a gun, shot Lawless and fled Mitchell's home. Where Lawless and defendant diverged was regarding the events that took place during their argument leading up to the shooting.

Lawless testified that the shooting was preceded by an argument that started because defendant was "playing around with" a .9 mm semiautomatic and Lawless asked him to stop and put the gun away. Although Lawless explained that he and defendant were arguing with 10 feet between them, he said that at some point in the argument, defendant slapped him. Lawless did not remember if he retaliated in any way, but remembered that he had no weapons on him that day. Lawless testified that after the slap, defendant raised his gun, and aimed it at Lawless.

Lawless again insisted that defendant was 10 feet away as Lawless raised his left hand to protect his face and defendant pulled the trigger. Lawless fell to the floor, and watched as defendant jumped over his body and ran out of Mitchell's house.

Defendant denied playing with his handgun at all that day. According to defendant, once he and Lawless were alone, Lawless asked him to borrow money. Defendant testified that he refused, and Lawless, who was very intoxicated, became angry. Thereafter, a heated argument ensued, and Lawless shoved defendant. Defendant testified that he shoved Lawless back, and then Lawless grabbed a chair. Defendant said that when Lawless "charged toward" him with the chair raised, defendant pulled his handgun from his pocket and pointed it toward the floor. He explained that when Lawless tossed the chair toward him, it caused his arm to jerk back, and grab for the gun. Defendant testified that he had no intention to shoot Lawless, but had pulled the gun out because, although he had no particular reason to fear Lawless, Lawless had been acting irrationally and had threatened him with the chair. Defendant claimed that, during the struggle for the handgun, his finger pulled the trigger and the firearm discharged, shooting

> Lawless through the hand that had been reaching for the gun and in the side of the face.[1]

The Court of Appeals majority reversed on the ground of improper questioning of witnesses by the trial judge, most particularly the complainant:

> THE COURT: Mr. Lawless, let me ask you a couple of questions, okay, but look at the jury while I'm asking you the questions if you will, all right. On the date that this incident happened, November 21, 2014, where did you come from when you went to Karla Mitchell's house?
>
> THE WITNESS: My house.
>
> THE COURT: Okay. And was anyone with you at your house before you went to Karla Mitchell's house?
>
> THE WITNESS: No.
>
> THE COURT: Now you've indicated that you've known Mr. Chatman for some period of time and you were friends, right?
>
> THE WITNESS: Correct.
>
> THE COURT: On this particular day when you went to Karla Mitchell's house, did you have any weapon on you? Did you have a gun, a knife, anything?
>
> THE WITNESS: No.
>
> THE COURT: Now you say that you were in the kitchen of this house and you were present, Mr. Chatman was present. Who else was present in the kitchen?
>
> THE WITNESS: A guy named Mike, a young guy named Mike.
>
> THE COURT: A young guy by the name of Mike, okay. Did Mike appear to you to have a weapon?
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> THE WITNESS: No.

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[1] *People v. Chatman*, No. 328246, 2016 WL 7130962, at 1 (2016).

THE COURT: So the only person that had a weapon in this kitchen was Mr. Chatman?

THE WITNESS: Correct.

THE COURT: Now you say that you had this argument with Mr. Chatman. I'm a little — I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?

THE WITNESS: No, it wasn't no hour or two. It was a couple minutes.

THE COURT: A couple minutes?

THE WITNESS: Yes.

THE COURT: And how did it escalate to the point to where he wound up slapping you? Did he slap you first or did —

THE WITNESS: Yes.

THE COURT: Okay. And when he slapped you, what were you saying to him? Had you said something to him?

THE WITNESS: No.

THE COURT: Did you say anything to him or do anything that would have angered him as far as you know?

THE WITNESS: The only time I said something, I said about the gun.

THE COURT: What did you say about the gun?

THE WITNESS: "Quit playing with the gun like that."

THE COURT: "Quit playing with the gun like that."

THE WITNESS: Correct.

THE COURT: And why did you tell him quit playing with the gun like that?

THE WITNESS: Somebody mess around and get shot.

THE COURT: Someone could get hurt, okay. And when you said this to him, how far away from him were you?

THE WITNESS: About ten feet.

THE COURT: About ten feet, like when the assistant prosecutor went up? Okay. What can you — demonstrate for us in some way, shape or form how he was playing with this gun. Could you stand up and show the jury? Don't talk now. Just demonstrate with your own hand as to how he was playing with it. Okay, so he was turning his hand from left to right or palm down to palm up, things like that?

THE WITNESS: Yes.

THE COURT: And this handgun, can you describe this handgun to us? Do you know what the difference between a revolver and a semiautomatic?

THE WITNESS: It was a nine millimeter.

THE COURT: It was a nine millimeter semiautomatic, right?

THE WITNESS: Correct.

THE COURT: Okay. Have you ever fired a handgun?

THE WITNESS: No.

THE COURT: A handgun — well, let me rephrase that. Okay, so this argument took place and he's playing around with this gun twisting in his hand left to right. What was the conversation about that you had that this handgun came out to begin with?

THE WITNESS: Can you repeat that one more time?

THE COURT: In other words, what were you talking about when Mr. Chatman pulled this handgun? I mean did he pull it out of his pants pocket, a jacket pocket or a shirt pocket or something?

THE WITNESS: No, he just had it in his hand. He had it in his hand walking around the house.

THE COURT: He had it in his hand walking around the house?

THE WITNESS: Correct.

THE COURT: Okay. When you saw this — well, not only that, but when you saw this hand gun [sic], why didn't you leave?

THE WITNESS: Wasn't thinking, Your Honor. I was over there visiting a friend, a good friend of mine. Just wasn't thinking.

THE COURT: You weren't thinking. All right, just look at the jury now. Tell them.

THE WITNESS: I just wasn't thinking. I should have left. I wasn't thinking.

THE COURT: Okay. Did you ever hit Mr. Chatman?

THE WITNESS: No.

THE COURT: Did you ever grab anything — well, you heard what other people had said to you, huh?

THE WITNESS: Correct.

THE COURT: Okay. Do you remember ever grabbing a chair or anything?

THE WITNESS: No.

THE COURT: Did you lay any hands on Mr. Chatman at all?

THE WITNESS: No.

THE COURT: And when you were shot, you were standing?

THE WITNESS: Correct.

THE COURT: And you were about how far away from Mr. Chatman?

THE WITNESS: About ten feet.

THE COURT: And he had his arm pointed directly at your head?

THE WITNESS: Correct.

THE COURT: Do you know what happened to Mr. Chatman after you were shot?

THE WITNESS: Jumped up — I was laying on the ground, he jumped over me and ran out the door.

THE COURT: Ran out the door?

THE WITNESS: Correct, front door.

THE COURT: Okay. How many times were you shot?

THE WITNESS: One.

THE COURT: One time?

THE WITNESS: Correct.

THE COURT: When is the next time you saw Mr. Chatman?

THE WITNESS: I didn't.

THE COURT: Well, you saw him at some point in time. You saw him at the preliminary examination, right?

THE WITNESS: Oh, yeah, yeah.

THE COURT: Okay. Did you see him at anytime from the time of the shooting up until the time the preliminary examination was conducted?

THE WITNESS: No.

THE COURT: Now you say you gave a statement to the police, right?

THE WITNESS: Correct.

THE COURT: Was this after you had been in the hospital for a couple days?

THE WITNESS: Yes, I was in the hospital.

THE COURT: How long were you in the hospital?

THE WITNESS: Seven days.

THE COURT: And approximately how long after this shooting took place did the police speak to you?

THE WITNESS: After the shooting you said?

THE COURT: Yes.

THE WITNESS: A few days later.

THE COURT: A couple days later. All right, now, the statement that was given to the police was actually an interview, in other words, they asked you questions, and you gave them answers?

THE WITNESS: Correct.

THE COURT: Okay. Did you write out the statement or did the police officer write out the statement?

THE WITNESS: I couldn't really write because my hand was —

THE COURT: And are you left-handed or right-handed?

THE WITNESS: Left.

THE COURT: You're left-handed. Have you been able to do anything with that left hand since this shooting?

THE WITNESS: No.[2]

Lawless had testified on the prosecution's direct examination:

Q. All right. Now after the defendant told you to not worry about it, him playing with the gun, what happens next?

A. He slapped me, and when he slapped me, at the same time I don't remember, I don't recall, he said I picked up a chair and then threw it at him. I don't recall it.

Q. Okay. Do you think that you did it?

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[2] T 6-2, 48-56. The trial judge asked questions of a number of other witnesses, and also instructed the jury that "My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." T 6-3, 83.

Further, the trial judge did not interrupt direct or cross-examination, but held his questions until the parties had finished, and then allowed further examination by the parties if they desired. See e.g. T 6-2, 48 ff, 73 ff, 127 ff.

A. If I did, I can't remember.[3]

The majority also found that "The tone of the trial judge in questioning" Detective Bock was argumentative concerning fingerprints and the gun used, and that the questioning of witness Reverend Fisher as to whether he saw Lawless or anyone else aside from defendant with a weapon on the day of the incident was improper because the defendant "admitted he had a gun. There was no basis for the trial judge to intervene in this witness's testimony. The only contested issue in this case was whether defendant shot Lawless unprovoked or in self-defense, and the question of who possessed weapons in the kitchen prior to the incident, while relevant, was not so difficult for the jury to discern that it required clarification from the judge."[4]

Judge Gadola dissented from reversal, finding that

> While arguably oriented in favor of the prosecution, the judge's questioning concerning defendant's possession of a weapon, the type of weapon the defendant possessed, and whether the victim possessed a weapon, was not hostile and did not directly undermine the defense theory. Furthermore, this questioning can be described as simply clarifying or, alternatively, merely repeating testimony that had already been presented on an uncontested issue.
>
> Indeed, the judge's questioning of prosecution witness Michigan State Police Lieutenant Bock was largely ineffectual and might actually have been helpful to the defendant, as the witness was unable to testify that the "state ID number" on the fingerprint identification card matched that of the defendant in this case. Again, while this questioning might have been slanted in favor of the prosecution, I cannot conclude that it pierced the veil of judicial impartiality given its non-argumentative nature and its intent to clarify whether the fingerprints on the fingerprint ID card were those of the defendant.

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[3] T 6-2, 20. Defendant also claims error in several questions to other witnesses regarding whether anyone else in the house possessed a gun. Neither the defendant nor the victim claimed anyone did, and the defendant candidly admitted he, as a felon, illegally possessed the gun. That no one else possessed a gun did not affect either defendant's or the victim's version of events.

[4] *People v. Chatman*, at 5.

> A review of the record reveals that the trial court asked a total of three questions in the course of a 3–day trial concerning the ultimate issue in dispute in this case, which concerned whether a physical struggle between the defendant and the victim led to the victim's shooting. The court asked the victim: (1) "Did you ever grab anything ... ?"; (2) "Do you remember ever grabbing a chair or anything?"; and (3) "Did you lay any hands on [defendant] at all?" These questions, while arguably unnecessary given the prosecution's direct examination of the witness, were not hostile, as they were directed to the victim, and merely produced cumulative testimony concerning the events leading up to the shooting. Again, I cannot conclude that these questions pierced the veil of judicial impartiality. Furthermore, the trial court gave a proper limiting instruction to the jury as follows: "My comments, rulings, questions and instructions are ... not evidence.... If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion."
>
> While the trial judge's questions were in large measure unnecessary and arguably inappropriate, I cannot conclude that the court improperly influenced the jury by creating an appearance of advocacy or partiality.[5]

The People seek leave to appeal.

[5] *People v. Chatman*, 11.

Argument

I.

A judge may question witnesses, but may not in so doing create the appearance of advocacy or partiality against a party so that it is reasonably likely that the jury was improperly influenced by this appearance. Though this Court has held that where error of this sort occurs there is no review for harmless error where the issue is preserved, here the issue was *not* preserved, and so review is thus for plain error, and defendant failed to demonstrate that error, let alone plain error, occurred.

Introduction: The Court of Appeals Straw Man

The Court of Appeals, on its way to reversal, said that

> The prosecution argues that defendant's convictions cannot be reversed under *Stevens* where the issue of judicial bias was not preserved below. 498 Mich at 164 ("When the issue is preserved *and* a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial.") (Emphasis added.). We disagree and hold that *Stevens* did not disturb the plain error standard of review for unpreserved claims of judicial bias, *Jackson*, 292 Mich App at 597, under which reversal is still an appropriate form of relief.[6]

The People are more than a little flummoxed at this identification and rejection of an argument by the People that "defendant's convictions cannot be reversed under *Stevens* where the issue of judicial bias was not preserved below," when no such argument was remotely suggested by the People. The People's issue heading included the statement that "No showing of bias has been

[6] *People v. Chatman*, at 7 (fn 1).

made, let alone plain error, given the lack of objection," the People's Standard of Review section of the brief said that "defendant must show that there was plain error, that resulted in the conviction of an actually innocent defendant, or that the error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence" given his lack of objection, and a subheading of the People's brief said that "*People v Stevens* concerns a preserved claim; review remains limited to plain error on unpreserved claims of judicial bias shown through witness interrogation." It seems rather apparent that the People argued to the Court of Appeals that *Stevens* held review for harmless error inappropriate only for preserved claims, but that the claim here was unpreserved, and so the standard was plain error, which had not been shown, and did *not* argue that reversal is never possible if the *Stevens* claim is not preserved. The Court of Appeals erred in finding plain error here.

Discussion

A. *Stevens* overstates the nature of the error when error occurs

MRE 614(b) provides that "The court may interrogate witnesses, whether called by itself or by a party," and MRE 614(c) expands the ordinary contemporaneous objection rule, providing that "Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present." Defendant did not object, and thus was required to show that that there was error that was plain, that affected substantial rights, and to a degree that the error resulted in the conviction of an actually innocent defendant, or that the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.[7] This Court's decision in *People*

[7] *People v. Carines*, 460 Mich. at 763-764.

v Stevens[8] sets the standard for when error occurs, and for when reversal is required for *preserved* claims of judicial error through witness examination: "*When the issue is preserved* and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review."[9] This is so, said the Court, because the error is constitutional—"A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial"[10]—and constitutes "a 'structural defect[ ] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards.'"[11] And the standard for determining whether the judge's questioning of witnesses was improper was determined by this Court to be

> when considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury *by creating the appearance of advocacy or partiality* against a party. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial.[12]

Respectfully, this overstates the matter.

MRE 614(b), identical to FRE 614(b), provides that "The court may interrogate witnesses, whether called by itself or by a party." Though not contained in the text of the rule, it

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[8] *People v. Stevens,* 498 Mich. 162 (2015).

[9] *Id*., at 164 (emphasis supplied).

[10] *Id*.

[11] *Id*., at 178-179.

[12] *Id*., at 164 (emphasis supplied).

is well understood—even before the promulgation of the rule—that judges, when questioning witnesses, must not exhibit partiality.[13] A judge's questioning of witnesses is reviewed for abuse of discretion, and questioning that shows partiality is an abuse of that discretion.

> We review for abuse of discretion. . . . Evidence Rule 614(b) provides that the court may interrogate witnesses. . . . This has been an important and longstanding practice on the part of trial judges and should not be discouraged. *See Riley v. Goodman,* 315 F.2d 232, 234 (3d Cir.1963) ("We have long abandoned the adversary system of litigation which regards opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed."). Of course, a judge must not "abandon his [or her] proper role and assume that of an advocate." *United States v. Green,* 544 F.2d 138, 147 (3d Cir.1976). But the abuse of discretion standard is a deferential one and in order to meet the standard the conduct of a trial judge must be "inimical and partisan, clearly evident and prejudicial." *Riley,* 315 F.2d at 235. In making this determination, "[e]ach case must be viewed in its own setting."[14]

And so the question involved should be whether a trial judge in questioning witnesses abused the discretion given the judge under MRE 614(b), that discretion being abused when the judge's questioning implies to the jury advocacy on the part of the judge. This Court in *Stevens* determined that the standard for determining when the judge has gone too far is when,

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[13] "It is within the trial court's discretion to question witnesses as long as he remains impartial and does not exhibit prosecutorial zeal." *United States v. Zepeda-Santana*, 569 F.2d 1386, 1389 (CA 5, 1978).

[14] *Chainey v. Street*, 523 F.3d 200, 221–222 (CA 3, 2008). See also *United States v. Adedoyin*, 369 F.3d 337, 342 (CA 3, 2004) (" Our review of the district court's questioning of Adedoyin and Warrick pursuant to Federal Rule of Evidence 614(b) is for abuse of discretion. If we find that the court abused its discretion, we must determine whether the questioning was harmless or prejudiced Adedoyin's substantial rights"); *United States v. Stover*, 329 F.3d 859, 868 (CA DC, 2003) (" It is an abuse of discretion, however, for a judge to ask questions signifying that he finds the witness believable").

"considering the totality of the circumstances, it is reasonably likely that the judge's conduct *improperly influenced the jury* by creating the *appearance of advocacy or partiality* against a party."[15] The People submit, however, that this Court's statement that this constitutes *constitutional* error, rather than error by an abuse of discretion, and not only constitutional error, but *structural* constitutional error,[16] goes too far. Trial by an *actually* biased judge is structural error,[17] but the giving to the jury an *appearance* of partiality is an abuse of discretion under MRE 614(b). This Court has found the error always reversible, with the giving of a curative instruction, particularly one given immediately rather than—or in addition to—at the conclusion of the trial pertinent to the advocacy/appearance inquiry. So be it, though this is contrary to the

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[15] *People v. Stevens*, 498 Mich. at 171 (emphasis supplied).

[16] "Such structural error requires reversal without regard to the evidence in a particular case. *Chapman,* 386 U.S. at 23 & n. 8, 87 S.Ct. 824, citing *Tumey,* 273 U.S. 510, 47 S.Ct. 437; *Wallace v. Bell,* 387 F.Supp.2d 728, 738 (E.D.Mich., 2005) ('Certainly, the trial record confirms the state court's finding that the prosecution's case was strong; but once the court determined that the trial judge's actions exhibited bias, reversal and a new trial is the only permissible consequence.'). Accordingly, judicial partiality can never be held to be harmless and, therefore, is never subject to harmless-error review. *Fulminante,* 499 U.S. at 309–310, 111 S.Ct. 1246, citing 247 *Tumey,* 273 U.S. 510, 47 S.Ct. 437. The conviction must be reversed 'even if no particular prejudice is shown and even if the defendant was clearly guilty.' *Chapman,* 386 U.S. at 43, 87 S.Ct. 824 (Stewart, J., concurring). To this extent, we overrule *People v. Weathersby,* 204 Mich.App. 98, 514 N.W.2d 493 1994), and all other cases applying harmless-error analysis to questions of judicial partiality." *People v. Stevens*, 498 Mich. at 179–180.

[17] "There are some constitutional errors that cannot be categorized as harmless error. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) noted three: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge." *United States v. Campbell*, 223 F.3d 1286, 1294 (CA 11, 2000). And see *Tumey v. State of Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927), cited by the Court in *Stevens*, where the Supreme Court held that "it it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."

rule in other jurisdictions.[18]

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[18] It is not true federally, and MRE 614(b) is borrowed from FRE 614(b). As Justice Frankfurther said,"[I]f a word is obviously transported from another legal source, whether the common law or other legislation, it brings its soil with it." Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L.Rev. 527, 537 (1947). See *United States v. Adedoyin*, supra, 369 F.3d at 342 ("If we find that the court abused its discretion, we must determine whether the questioning was harmless or prejudiced Adedoyin's substantial rights"); *United States v. Barnhart*, 599 F.3d 737, 739 (CA 7, 2010) ("We agree that the judge's questioning of the witnesses during this trial went too far, but it did not prejudice Barnhart's substantial rights given the overwhelming evidence of his guilt").

As said by the Third Circuit—and in a case of preserved error—"Although this is a close call, Ottaviano's pro se status, combined with the fact that he moved for a mistrial at the outset of the next day's business, counsel in favor of holding that he preserved that issue for appeal." And:

> Having found error, *we turn to the question of remedy*. As Ottaviano's able counsel acknowledged at oral argument, *improper judicial questioning is not structural error*, the very existence of which renders a trial fundamentally unfair. . . . Thus, the verdict must stand if the error did not deprive Ottaviano of a fair trial. . . . We must examine the trial record as a whole to determine whether the error prejudiced the defendant. . . . *An error is harmless if it is "highly probable that the error did not contribute to the judgment*.". . .
>
> Some of the factors we have considered in determining whether to reverse for improper judicial questioning include: the portion of the trial record affected, whether the jury was present, whether the judge appeared to treat both sides evenhandedly, whether curative instructions were provided, the extent to which the judge betrayed bias or cast doubt on the witness's credibility, and other evidence of the defendant's guilt.
>
> *United States v. Ottaviano*, 738 F.3d 586, 594, 596 (CA 3, 2013) (emphasis supplied)
>
> And see *Guthmiller v. Weber*, 804 N.W.2d 400, 406–407 (S.D., 2011):
>
> the trial judge's improper comments do not fit within one of the six categories of structural error recognized by the Supreme Court. . . . Rather, the habeas court declared the errors structural because Guthmiller's "constitutional right to have his case heard and determined by a jury of impartial individuals free from influence or intimation by the trial court as to his guilt" was violated. Yet solely the fact that the judge made inappropriate comments does not mean that the judge was biased. For a judge to have bias against a defendant, there must be evidence of "personal enmity towards the party or in favor of the adverse party to the other party's detriment.". . .

The People submit, then, that the question is not one of constitutional error that is structural—where the issue is preserved—but of an abuse of discretion, under the standard announced in *Stevens*, where, in Michigan under *Stevens*, error is always reversible where preserved. But that an error causes an unfair trial under the applicable standard for reversal does not transmogrify a nonconstitutional error into a constitutional one. Nonconstitutional errors may certainly cause reversible error just as may constitutional errors, but even if reversal is required the error remains nonconstitutional. The People submit that an MRE 614(b) error is nonconstitutional, which, this Court has determined in *Stevens*, will always be sufficiently prejudicial for reversal where preserved, and to that extent suggest that *Stevens* overstates the nature of the error.

B. Whether the error is viewed as structural or not, where the error is not preserved, review is for plain error, and there was no error here, certainly not error meeting the onerous standard of plain error

1. No *Stevens* error occurred here, the questioning not approaching that which occurred in *Stevens*

Stevens was concerned explicitly with claims of preserved error, and no objection was lodged in the present case. Review *is* thus for plain error, and, assuming for the moment only that error occurred, the prejudice prong requires a showing that error occurred, that the error was plain or obvious, that it affected defendant's substantial rights, and that it did so to a degree that

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> "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." . . . Counsel for Guthmiller asks, "How can a criminal defendant have a legitimate chance of convincing a jury nothing happened if the judge keeps telling them something happened?" In answer, we must say that while the trial judge's comments were clearly improper, and frankly, inexplicable, they must be assessed in context with the entire case and, in that light, these remarks cannot be classified as structural errors.

the trial "resulted in the conviction of an actually innocent defendant, or . . . the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence."[19] The Court of Appeals majority gave bare lip service to this standard, reversing essentially because the majority found error: "Considering the factors enunciated in *Stephens* [sic], the court's questioning of Lawless demonstrated the appearance of advocacy for the prosecution. Considering the totality of the circumstances, we conclude that the judge's questioning pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial."[20] But in point of fact, this case does not approach *Stevens*.

The Court of Appeals majority was concerned with the questioning by the trial judge of three witnesses: the complainant, Lawless; Reverend Lumsie Fisher; and Detective Lieutenant Bock. The latter two may be disposed of quickly. The Court of Appeals majority said as to the court's questioning of Lieutenant Bock that "the judge's questions may have begun by seeking a point of clarification regarding the fingerprint analyst's process for comparison and identification, but the questioning transgressed to advocacy for the prosecution. The tone of the trial judge in questioning this witness appears argumentative. Detective Bock was not evasive. . . . She was clear in her testimony that it was not her job to connect fingerprints with specific individuals. The judge continued to prod however, and later when unsatisfied, accused the witness of speculating. It is apparent from the judge's line of questioning that the judge sought to prove that the state ID number used to identify certain fingerprints taken from the gun belonged to the defendant. It was

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[19] The federal circuits examining claims where there has been no objection under FRE 614(c) review for plain error. See e.g. *United States v. Godwin*, 272 F.3d 659, 679 (CA 4, 2001).

[20] *People v. Chatman*, at 8.

improper for the judge to endeavor to make this point for the prosecution."[21] But though the judge may have shown frustration with the witness, the matter was one of entirely no consequence. There was *no* issue that the defendant shot the victim; his defense was a combination of accident and self-defense. The jury could hardly have been affected by the questioning of the trial judge on the point—which does not show bias in any event—when possession of the firearm by defendant is not a contested point. With regard to Reverend Fisher, the point is much the same. The Court of Appeals said "The judge also asked Reverend Fisher whether he saw Lawless or anyone else aside from defendant with a weapon on the day of the incident. Although the judge's questioning was brief, it was improper. Again, 'the central object of judicial questioning should be to clarify.'. . . Defendant admitted he had a gun. There was no basis for the trial judge to intervene in this witness's testimony. The only contested issue in this case was whether defendant shot Lawless unprovoked or in self-defense, and the question of who possessed weapons in the kitchen prior to the incident, while relevant, was not so difficult for the jury to discern that it required clarification from the judge."[22] But there is no "the testimony required clarification" rule; the questioning must show bias. The majority's conclusion that "[a]sking the same questions to Reverend Fisher [as the prosecution had asked of the complainant] only reinforced Lawless's status as an unarmed victim and the prosecution's theory of the case"[23] is fanciful. As the Court of Appeals itself noted here, there was no issue as to the defendant being armed and the complainant having no weapon; the defendant admitted as much,

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[21] *Id.*, at 7.

[22] *Id.*, at 5.

[23] *Id.*

his claim being that the complainant attacked him with a chair. The questioning, even if unnecessary, was innocuous, and does not come close to that which occurred in *Stevens*, where the trial court denigrated the defense expert, both in terms of his travel in order to testify, and his qualifications, among other inappropriate questions, particularly hostile questions asked of the defendant himself.[24] The present case is in no way similar.

The heart of the concern of the Court of Appeals majority is the questioning of the complainant.

> THE COURT: Mr. Lawless, let me ask you a couple of questions, okay, but look at the jury while I'm asking you the questions if you will, all right. On the date that this incident happened, November 21, 2014, where did you come from when you went to Karla Mitchell's house?
>
> THE WITNESS: My house.
>
> THE COURT: Okay. And was anyone with you at your house before you went to Karla Mitchell's house?
>
> THE WITNESS: No.
>
> THE COURT: Now you've indicated that you've known Mr. Chatman for some period of time and you were friends, right?
>
> THE WITNESS: Correct.
>
> THE COURT: On this particular day when you went to Karla Mitchell's house, did you have any weapon on you? Did you have a gun, a knife, anything?
>
> THE WITNESS: No.
>
> THE COURT: Now you say that you were in the kitchen of this house and you were present, Mr. Chatman was present. Who else was present in the kitchen?

[24] *People v. Stevens*, 498 Mich. At 182-185.

THE WITNESS: A guy named Mike, a young guy named Mike.

THE COURT: A young guy by the name of Mike, okay. Did Mike appear to you to have a weapon?

THE WITNESS: No.

THE COURT: So the only person that had a weapon in this kitchen was Mr. Chatman?

THE WITNESS: Correct.

THE COURT: Now you say that you had this argument with Mr. Chatman. I'm a little — I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?

THE WITNESS: No, it wasn't no hour or two. It was a couple minutes.

THE COURT: A couple minutes?

THE WITNESS: Yes.

THE COURT: And how did it escalate to the point to where he wound up slapping you? Did he slap you first or did —

THE WITNESS: Yes.

THE COURT: Okay. And when he slapped you, what were you saying to him? Had you said something to him?

THE WITNESS: No.

THE COURT: Did you say anything to him or do anything that would have angered him as far as you know?

THE WITNESS: The only time I said something, I said about the gun.

THE COURT: What did you say about the gun?

THE WITNESS: "Quit playing with the gun like that."

THE COURT: "Quit playing with the gun like that."

THE WITNESS: Correct.

THE COURT: And why did you tell him quit playing with the gun like that?

THE WITNESS: Somebody mess around and get shot.

THE COURT: Someone could get hurt, okay. And when you said this to him, how far away from him were you?

THE WITNESS: About ten feet.

THE COURT: About ten feet, like when the assistant prosecutor went up? Okay. What can you — demonstrate for us in some way, shape or form how he was playing with this gun. Could you stand up and show the jury? Don't talk now. Just demonstrate with your own hand as to how he was playing with it. Okay, so he was turning his hand from left to right or palm down to palm up, things like that?

THE WITNESS: Yes.

THE COURT: And this handgun, can you describe this handgun to us? Do you know what the difference between a revolver and a semiautomatic?

THE WITNESS: It was a nine millimeter.

THE COURT: It was a nine millimeter semiautomatic, right?

THE WITNESS: Correct.

THE COURT: Okay. Have you ever fired a handgun?

THE WITNESS: No.

THE COURT: A handgun — well, let me rephrase that. Okay, so this argument took place and he's playing around with this gun twisting in his hand left to right. What was the conversation about that you had that this handgun came out to begin with?

THE WITNESS: Can you repeat that one more time?

THE COURT: In other words, what were you talking about when Mr. Chatman pulled this handgun? I mean did he pull it out of his pants pocket, a jacket pocket or a shirt pocket or something?

THE WITNESS: No, he just had it in his hand. He had it in his hand walking around the house.

THE COURT: He had it in his hand walking around the house?

THE WITNESS: Correct.

THE COURT: Okay. When you saw this — well, not only that, but when you saw this hand gun [sic], why didn't you leave?

THE WITNESS: Wasn't thinking, Your Honor. I was over there visiting a friend, a good friend of mine. Just wasn't thinking.

THE COURT: You weren't thinking. All right, just look at the jury now. Tell them.

THE WITNESS: I just wasn't thinking. I should have left. I wasn't thinking.

THE COURT: Okay. Did you ever hit Mr. Chatman?

THE WITNESS: No.

THE COURT: Did you ever grab anything — well, you heard what other people had said to you, huh?

THE WITNESS: Correct.

THE COURT: Okay. Do you remember ever grabbing a chair or anything?

THE WITNESS: No.

THE COURT: Did you lay any hands on Mr. Chatman at all?

THE WITNESS: No.

THE COURT: And when you were shot, you were standing?

THE WITNESS: Correct.

THE COURT: And you were about how far away from Mr. Chatman?

THE WITNESS: About ten feet.

THE COURT: And he had his arm pointed directly at your head?

THE WITNESS: Correct.

THE COURT: Do you know what happened to Mr. Chatman after you were shot?

THE WITNESS: Jumped up — I was laying on the ground, he jumped over me and ran out the door.

THE COURT: Ran out the door?

THE WITNESS: Correct, front door.

THE COURT: Okay. How many times were you shot?

THE WITNESS: One.

THE COURT: One time?

THE WITNESS: Correct.

THE COURT: When is the next time you saw Mr. Chatman?

THE WITNESS: I didn't.

THE COURT: Well, you saw him at some point in time. You saw him at the preliminary examination, right?

THE WITNESS: Oh, yeah, yeah.

THE COURT: Okay. Did you see him at anytime from the time of the shooting up until the time the preliminary examination was conducted?

THE WITNESS: No.

THE COURT: Now you say you gave a statement to the police, right?

THE WITNESS: Correct.

THE COURT: Was this after you had been in the hospital for a couple days?

THE WITNESS: Yes, I was in the hospital.

THE COURT: How long were you in the hospital?

THE WITNESS: Seven days.

THE COURT: And approximately how long after this shooting took place did the police speak to you?

THE WITNESS: After the shooting you said?

THE COURT: Yes.

THE WITNESS: A few days later.

THE COURT: A couple days later. All right, now, the statement that was given to the police was actually an interview, in other words, they asked you questions, and you gave them answers?

THE WITNESS: Correct.

THE COURT: Okay. Did you write out the statement or did the police officer write out the statement?

THE WITNESS: I couldn't really write because my hand was —

THE COURT: And are you left-handed or right-handed?

THE WITNESS: Left.

THE COURT: You're left-handed. Have you been able to do anything with that left hand since this shooting?

THE WITNESS: No.[25]

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[25] T 6-2, 48-56. The trial judge asked questions of a number of other witnesses, and also instructed the jury that "My comments, rulings, questions and instructions are also not evidence. It is my duty to see that the trial is conducted according to the law and to tell you the law that

This questioning was neither partial nor intimidating, nor did it suggest belief in the victim's testimony. Defendant complains of questions such as "how did it escalate to the point where he wound up slapping you?" as assuming the victim's testimony was true.[26] It did no such thing. The victim had testified that he had been slapped after telling the defendant to stop playing with a gun; his recall of the matter was shaky, given his degree of intoxication, and that he had been shot in the head. He testified on the prosecution's direct examination:

> Q. All right. Now after the defendant told you to not worry about it, him playing with the gun, what happens next?
>
> A. He slapped me, and when he slapped me, at the same time I don't remember, I don't recall, he said I picked up a chair and then threw it at him. I don't recall it.
>
> Q. Okay. Do you think that you did it?
>
> A. If I did, I can't remember.[27]

The trial judge's questions did not assume the victim's testimony was *true*, but that it had been *given*. It is plain that the trial judge was attempting to clarify: "I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?" Nothing in the

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applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." T 6-3, 83.

[26] Defendant's Brief in the Court of Appeals, p. 14.

[27] T 6-2, 20. Defendant also claims error in several questions to other witnesses regarding whether anyone else in the house possessed a gun. Neither the defendant nor the victim claimed anyone did, and the defendant candidly admitted he, as a felon, illegally possessed the gun. That no one else possessed a gun did not affect either defendant's or the victim's version of events.

questioning suggests that the defendant's version of events is a lie, and the victim's the truth (and the two versions are actually not much different, defendant's claim simply being that the gun accidentally discharged, and that the shooting was also self-defense). The majority's view that the questioning, because repetitive of the questioning by the prosecutor, reinforced the testimony, and in that way gave the appearance of bias, is entirely speculative. The jury could well have drawn the inference that the judge was covering some of the same ground because of *doubt* of the witness's veracity. But the questioning itself, whether *necessary* or not, does not give an inference of bias. Again, when compared with *Stevens*, the matter is not close.

Judge Gadola in dissent got the matter right.

> While arguably oriented in favor of the prosecution, the judge's questioning concerning defendant's possession of a weapon, the type of weapon the defendant possessed, and whether the victim possessed a weapon, was not hostile and did not directly undermine the defense theory. Furthermore, this questioning can be described as simply clarifying or, alternatively, merely repeating testimony that had already been presented on an uncontested issue.
>
> Indeed, the judge's questioning of prosecution witness Michigan State Police Lieutenant Bock was largely ineffectual and might actually have been helpful to the defendant, as the witness was unable to testify that the "state ID number" on the fingerprint identification card matched that of the defendant in this case. Again, while this questioning might have been slanted in favor of the prosecution, I cannot conclude that it pierced the veil of judicial impartiality given its non-argumentative nature and its intent to clarify whether the fingerprints on the fingerprint ID card were those of the defendant.
>
> A review of the record reveals that the trial court asked a total of three questions in the course of a 3–day trial concerning the ultimate issue in dispute in this case, which concerned whether a physical struggle between the defendant and the victim led to the victim's shooting. The court asked the victim: (1) "Did you ever grab anything ... ?"; (2) "Do you remember ever grabbing a chair or anything?"; and (3) "Did you lay any hands on [defendant] at all?"

> These questions, while arguably unnecessary given the prosecution's direct examination of the witness, were not hostile, as they were directed to the victim, and merely produced cumulative testimony concerning the events leading up to the shooting. Again, I cannot conclude that these questions pierced the veil of judicial impartiality. Furthermore, the trial court gave a proper limiting instruction to the jury as follows: "My comments, rulings, questions and instructions are ... not evidence.... If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion."
>
> While the trial judge's questions were in large measure unnecessary and arguably inappropriate, I cannot conclude that the court improperly influenced the jury by creating an appearance of advocacy or partiality.[28]

Plain error did not occur, because *Stevens* error did not occur at all.

2. Even if error occurred, defendant cannot meet the standard of plain error for reversal, and the Court of Appeals majority erred in finding otherwise

If error occurred here—even if the Court in *Stevens* was correct that where preserved the error is structural, though again, other jurisdictions do not take that view—the standard of review is plain error here because the claim was not preserved. That error is structural, though People believe if error occurred here it was *not* structural, does not mean that it constitutes plain error as a matter of definition. This Court has so held. In *People v. Cain* the Court was "not persuaded that the trial court's failure to properly swear the jury [which the Court had found was structural error] seriously affected the fairness, integrity, or public reputation of the judicial proceedings in this case and defendant does not even argue that he is actually innocent."[29] The Court also so

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[28] *People v. Chatman*, at 11.

[29] *People v. Cain*, 498 Mich. 108, 119 (2015).

held in *People v. Vaughn*,[30] regarding the structural error denial of a public trial, saying that "Although denial of the right to a public trial is a structural error, it is still subject to this requirement [of meeting the standard of plain error]. While 'any error that is 'structural' is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings,' the plain-error analysis requires us to consider whether an error '*seriously* ' affected those factors."[31]

Cases from other jurisdictions demonstrate that error in this regard may not be plain error (indeed, unlike in Michigan, may even be harmless error, where the error is preserved). For example, in *United States v. Barnhart*[32] the court, after reviewing questioning of witnesses by the trial judge, concluded that "Considered as a whole and in light of the entire trial, the judge's questioning of the witnesses went beyond mere clarification and *instead gave the impression that the judge disbelieved Barnhart's defense.* Trial judges need not be silent spectators, but they *are* neutral arbiters; the quantity and quality of the judge's questions in this case conveyed an improper skepticism about Barnhart's defense. This was error, but whether it affected Barnhart's substantial rights is another matter."[33] Applying the standard of plain error, because the issue was unpreserved, the court said that to "establish prejudice, Barnhart must show that but for the judge's improper questioning, he probably would not have been convicted." Though "the trial judge's influence on the jury is ordinarily 'of great weight' . . . the risk of prejudice from judicial questioning can be minimized if, as here, the judge issues an instruction at the close of the case

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[30] *People v. Vaughn*, 491 Mich. 642 (2012).

[31] *People v. Vaughn*, 491 Mich. at 666–667.

[32] *United States v. Barnhart*, 599 F.3d 737 (CA 7, 2010).

[33] *Id.*, 599 F.3d at 745 (first emphasis added).

reminding the jury that nothing he said should be construed as an opinion about the evidence or to suggest what the jury's verdict should be. . . . This is especially true where, as here, the evidence of guilt is very strong. We are confident that the judge's questions to the witnesses, though they crossed the line, did not affect the outcome of this trial."[34]

Plain error was also applied in *United States v. Martinovich*.[35] Saying that "Appellant—not the Government—must show 'that the jury actually convicted [him] based upon the trial error,'"[36] the court agreed "that the district court crossed the line and was in error," but disagreed, "however, that the conduct of the trial deprived Appellant of a fair trial."[37] And the questioning by the trial judge here was nothing like that in *Martinovich*. There the court said that "we are once again confronted with a case replete with the district court's ill-advised comments and interference." The interference of the trial judge during defense questioning—which did not occur here—went much too far. But the court nonetheless did not find plain error, noting, among several things, the giving of a cautionary instruction at the end of the case. The court said "We recognize that one curative instruction at the end of an extensive trial may not undo the district court's actions throughout the entire trial, but we are also cognizant that Appellant failed to alert the district court of what Appellant now perceives as improper."[38] In the present case a cautionary instruction was given at the end of the trial, and the majority opinion would likely

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[34] *Id.*, 599 F.3d 737, 745–746.

[35] *United States v. Martinovich*, 810 F.3d 232 (CA 4, 2016).

[36] *Id.*, 810 F.3d at 238–239.

[37] *Id.*

[38] *Id.*, 810 F.3d 232, 241–242.

have found no error had such an instruction been given contemporaneously with the trial judge's questioning, the majority saying "A curative instruction immediately following the above colloquies, particularly between the judge and Lawless and the judge and Detective Bock, may have alleviated the appearance of advocacy for the prosecution."[39] But as in *Martinovich* there was no instruction at these times because defendant "failed to alert" the trial judge of what he "no perceives as improper." If the instruction would have alleviated the appearance of bias, then the degree of prejudice required for plain error cannot be shown.

In *United States v. Ottaviano*[40] the court considered the claim preserved, found error, and addressed it under harmless error, noting that the error is *not* structural.[41] The court said that the trial judge "skeptically questioned [defendant] at length during his direct examination and, after the Government completed its thorough cross-examination, 'follow[ed] up' on prosecutors' questions about Ottaviano's fake educational credentials with a barrage of its own. On redirect, the Court repeatedly interrupted again, challenging Ottaviano about his assertions and his witnesses' testimony. Then, at the end of redirect, the judge renewed his indignation about Ottaviano's false educational credentials, prodding him for approximately five pages of the trial transcript and inviting him to speculate on the ultimate issue in the case. . . . In the transcript, the

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[39] *People v. Chatman*, at 7.

[40] *United States v. Ottaviano*, 738 F.3d 586 (CA 3, 2013).

[41] *Id.*, 738 F.3d at 594, 596 ("improper judicial questioning is not structural error . . . . An error is harmless if it is "highly probable that the error did not contribute to the judgment"). The Michigan standard for preserved constitutional error is different, defendant carrying the burden of persuasion. *People v. Lukity*, 460 Mich. 484 (1999).

Court appears highly dubious of Ottaviano's defense."[42] No such impression appears from the transcript of the present case. But having found error, and found the error preserved, the court nonetheless did not reverse, finding that in the context of the evidence, "the Court's improper questioning was immaterial to the jury's verdict."[43]

Conclusion

The People submit that judicial questioning that goes too far constitutes an abuse of discretion, and is subject to review for harmless error. But even if viewed as structural error when preserved, review remains for plain error when unpreserved. The questioning here, even if viewed as "unnecessary" for purposes of clarifying testimony, was not hostile and showed no partiality. The burden of the defendant is not simply to show error—and the People maintain there was none—but to meet also the high standard that if error occurred it resulted in the conviction of an actually innocent defendant, or that the error seriously affects the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. The Court of Appeals majority, though citing this standard, essentially reversed because it found error. The dissent is correct that no plain error occurred.

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[42] *United States v. Ottaviano*, 738 F.3d at 596.

[43] *Id.*, 738 F.3d at 598.

Relief

Wherefore, the People request that leave to appeal be granted, or that the Court of Appeals be reversed for the reasons stated in the dissenting opinion of Judge Gadola.

Respectfully submitted,

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